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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 428

JACK CHRISTIAN, INDIVIDUALLY, ET AL
Petitioners,

versus

THEODORE J. JEMISON, ET AL
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, the Mayor-President of the City of Baton Rouge, Louisiana, other city and parish officials, and officials of the Baton Rouge Bus Company, Incorporated, made original defendants herein, pray that a write of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, rendered April 25, 1962, and as to which rehearing was denied on June 15, 1962.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported in *303 F.2d* at *page 52*, and is appended hereto as Appendix A. Judgment of the United States District Court for the Eastern District of Louisiana, from which appeal was taken, was by Minute Entry dated March 31, 1961 and is not reported.

STATEMENT OF JURISDICTION

(1) The Court has jurisdiction to consider and grant this petition pursuant to Title 28, United States Code, Sec. 1254.

(2) The date of the original opinion below was April 25, 1962. A petition for rehearing was filed on May 15, 1962, within the time provided by law and by the rules of the Court of Appeals for the Fifth Circuit, thus tolling the running of the three months' period within which a petition for writ of certiorari could be presented to this Honorable Court. *Dept. of Banking, State of Nebraska v. Pink*, 63 S. Ct. 233, 317 U.S. 264, 87 L. Ed. 254. The petition for rehearing was denied June 15, 1962 and this petition was filed within the time prescribed by Title 28, United States Code, Sec. 2101.

THE QUESTION PRESENTED

The sole question presented by this petition for writ of certiorari arises out of the granting of a motion for summary judgment under these circumstances:

In the proceedings below, plaintiffs filed a verified petition alleging among other things that they were Negro citizens

of the City of Baton Rouge, Louisiana, who use the public transportation system, and that they were compelled to occupy segregated sections of the buses operated by the Baton Rouge Bus Company under an existing City Ordinance which they sought to have declared unconstitutional. The defendants responded with a general denial of these allegations and asserted, in addition, certain affirmative defenses. Plaintiffs moved for a summary judgment but offered no affidavits or other proof in support of the allegations of the petition or of their motion. Plaintiffs submitted the case solely on the face of the pleadings consisting of the petition and an answer which denied substantial factual averments of that petition.

The question thus presented is whether the case, submitted solely on the pleadings and without supporting affidavits or other proof, was (as held by the Court of Appeals, Fifth Circuit) "ripe for summary judgment."

It is respectfully submitted that the case was not "ripe for summary judgment," and that the decision in this regard, if allowed to stand, utterly changes the **procedural** and **pleading** concepts embodied in the Federal Rules of Civil Procedure.

STATUTORY PROVISIONS INVOLVED

Rule 56 of the Federal Rules of Civil Procedure, reading in pertinent part, as follows:

> "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. **The judgment sought shall be rendered forthwith if the pleadings, depositions, and**

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." (Emphasis added)

STATEMENT OF THE CASE ON THE MOTION FOR SUMMARY JUDGMENT

The original complaint was filed on February 7, 1957, in the United States District Court for the Eastern District of Louisiana, Baton Rouge Division. The jurisdiction of the Federal District Court was invoked by plaintiffs under "Title 28, United States Code, Section 2281" and under "Title 28, United States Code, Section 2201 and 2202." The suit was instituted by six nominal plaintiffs, acting "individually and in behalf of others similarly situated" against the Mayor-President of the City of Baton Rouge and the Parish of East Baton Rouge, Louisiana; the members of the "City-Parish Councils" in their capacity as the governing authorities of these two political subdivisions; certain law enforcement officials; and the Baton Rouge Bus Company, Incorporated, the latter in its capacity as the holder of a franchise from the City of Baton Rouge for the transportation of passengers for hire. The petitioners sought declaratory and injunctive relief against enforcement as to them and other similarly situated of Section 118, Title 10, Chapter 2 of the Baton Rouge City Code of 1951.

Various pleas and preliminary motions filed by the defendants were either overruled or denied.

Plaintiffs thereafter filed a motion for summary judgment, alleging there was "no genuine issue as to any material fact . . ." Defendants answered the original complaint, reurging their plea of res judicata and placing at issue certain material facts. Defendants, therefore, denied that the plaintiffs were entitled to summary judgment or that the ordinance was invalid, as contended by them.

The motion for summary judgment was submitted on briefs to be filed. Thereafter, on April 4, 1961, Judge Herbert W. Christenberry of the United States District Court for the Eastern District of Louisiana rendered judgment holding the ordinance to be "unconstitutional and void" and enjoining defendants from enforcing it. The judgment was to become effective "when it shall have become final after exhaustion of appeals."

Plaintiffs' motion for summary judgment was based, as it had to be, upon Rule 56, Federal Rules of Civil Procedure, and the contention that there was no genuine issue in the case as to any material fact and that plaintiffs were, therefore, entitled to judgment as a matter of law.

Rule 56(c) reads in pertinent part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the **affidavits**, if any, show that there is no genuine issue as to any **material fact**, and that the moving party is entitled to a judgment as a matter of law." (Emphasis added)

It should be particularly noted that plaintiffs here offered no depositions, no affidavits, no request for admissions, or any

other supporting evidence or data whatsoever in support of their motion, and both the District and Appellate Courts were, therefore, of necessity, relegated to a study of the pleadings and the admissions and denials thereof, to determine whether or not there was, in fact, a "genuine issue as to any material fact" between the parties.

The principal factual bases of plaintiffs' complaint are contained in Count IV thereof, and from an examination of defendants' answer thereto it is apparent that several very key facts — material facts — are in dispute. Particularly in dispute are the allegations contained in Paragraphs 2, 9 and 12 of Count IV of plaintiffs' complaint. These allegations, denied in answer and, therefore, is dispute, are as follows:

(a) That plaintiffs are negro citizens of the City of Baton Rouge who use the public transportation system operated by defendant Baton Rouge Bus Company, Inc., in the City of Baton Rouge;

(b) Defendant Baton Rouge Bus Company, Inc., operates its buses on a segregated basis, which violates the rights guaranteed to plaintiffs under the Constitution and laws of the United States; and,

(c) That plaintiffs have been compelled to occupy segregated sections of the buses operated by defendant Baton Rouge Bus Company, Inc.

Certainly to the extent that the above alleged facts relied upon by plaintiffs in their complaint are denied in defendants' answer, these facts must be considered as at issue. Certainly, the mere statement of them likewise indicates the crucial quality and materiality of such facts to the legal contentions of plaintiffs.

The burden of establishing that there is no genuine controversy as to material facts rests upon the moving party. Here the plaintiffs, having failed to come forward with any evidentiary material whatsoever, have, therefore, offered no proof whatsoever of the facts relied upon, except to the extent that facts have been admitted in defendants' answer.

Despite the fact that the allegations and substantial averments of the plaintiffs' petition were denied, and despite the fact that plaintiffs offered no evidence whatsoever in support of their motion for summary judgment, the Court of Appeals nonetheless held that summary judgment was proper. The Court of Appeals sought to justify its conclusion in this regard, as follows:

> "The appellants claim also that summary judgment was improper since there were factual issues in dispute on which the district court should have received evidence. In their appellate brief, the defendants question whether the plaintiffs are Negro citizens of Baton Rouge who use the public transportation system, whether the Baton Rouge Bus Company operates its buses on a segregated system, and whether the plaintiffs have been compelled to occupy segregated sections of the buses. The plaintiffs' complaint specifically averred each of these facts. The defendants responded with a general denial. At no time **prior to judgment** did they attempt to show that these allegations by the plaintiff were in dispute; a general denial is insufficient for this purpose. 6 Moore's Federal Practice §56.15(3), (2nd Ed., 1953). On this basis the case was ripe for summary judgment."

It is respectfully submitted (the holding of the Court of Appeals in this case to the contrary notwithstanding) that

there is no authority, either in *6 Moore's Federal Practice, Section 56.15(3) (2nd Ed., 1953)* or in any cited case or other federal material which supports the view that a case is "ripe for summary judgment" where a defendant has answered and denied substantial averments of a plaintiff's petition and **no** evidence has been produced or offered by the plaintiff to support the disputed allegations of the petition. Such a holding shifts the burden of proof to the defendants in a manner never contemplated by the drafters of Rule 56 nor heretofore applied by any decision of which we are aware.

REASONS RELIED ON FOR GRANTING THE WRIT

WHERE DEFENDANTS' ANSWER CONTAINED DENIALS OF SUBSTANTIAL FACTUAL AVERMENTS AND THE ALLEGATIONS OF PLAINTIFFS' PETITION WERE UNSUPPORTED EITHER BY AFFIDAVIT OR OTHER EVIDENTIARY MATERIAL, THE CASE WAS NOT "RIPE FOR SUMMARY JUDGMENT." THE HOLDING OF THE COURT OF APPEALS TO THIS EFFECT WAS CONTRARY TO THE RULES OF FEDERAL PROCEDURE, CONFLICTS WITH OTHER FEDERAL DECISIONS RENDERED UNDER RULE 56, AND WILL HAVE FAR-REACHING EFFECT UNLESS CORRECTED.

Until this decision by the Court of Appeals, Fifth Circuit, on the motion for summary judgment, it appeared clear that a general denial of allegations of fact was sufficient to raise an issue which would prevent entry of summary judgment. The landmark case of *Garrett Biblical Institute v.*

American University (United States Court of Appeals, District of Columbia, 1947) *163 F.2d 265*, states the rule thus:

> "Appellee seriously asserts that an opposition consisting of legal conclusions and mere general denials does not raise such issue of fact that will prevent entry of summary judgment. While it has been so held, we cannot unqualifiedly sanction such a proposition. While the statement of a mere legal conclusion will not suffice to raise an issue, we think that a general denial of an allegation of fact is sufficient to raise an issue and that this is so elementary that we decline to follow authority to the contrary in other jurisdictions." (*163 F.2d 265, 267.*)

To the same effect is *Vale v. Bonnett* (United States Court of Appeals, District of Columbia, 1951), *191 F.2d 334*, holding that "standing alone the pleadings would raise" such an issue as to prevent entry of summary judgment.

It is therefore submitted that a most serious error, going far beyond the confines of the particular controversy involved in the instant case, has been committed by the holding that the general denial of defendant in answer of the substantial averments of plaintiffs' petition renders the case "ripe for summary judgment."

It is not enough to say that "at no time prior to judgment" did defendants attempt to show that the allegations of plaintiffs were in dispute. In the first place, as will be shown by the record herein, at the time plaintiffs' motion for summary judgment was heard, defendants' answer, which was far more than a general denial and contained substantial denials of plaintiffs' averments, was in the record, and had been for a period in excess of five months before the District Court's

judgment was entered in the minutes. In the second place, it is not incumbent upon a defendant in order to show that the allegations of the petition are in dispute to do more than answer the complaint. Once the answer is filed the burden shifts to the plaintiff. **The effect of the decision rendered by the Court of Appeals is to impose it on the defendant.**

The prior jurisprudence of all the Federal Courts amply supports the statement in *6 Moore's Federal Practice 2123 (Section 56.15(3))* (the only authority cited by the Court of Appeals against petitioners):

> "The Courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to judgment as a matter of law. The Court holds the movant to a strict standard. To satisfy his burden, the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion."

The only reference in Moore Sec. 56.15(3) relative to the production of evidence by one resisting a motion for summary judgment "prior to the hearing" is that to be found on page 2132 of Vol. 6. The "moving party's papers" may, of course, be sufficient to discharge the burden of showing that there is no genuine issue of fact, in which case the opposing "papers"

must be sufficient to raise a triable issue and be filed "prior to the hearing."

However, it is obvious that the "papers" referred to are not mere pleadings, for as the author correctly states:

> "The movant must sustain his burden of showing that there is no genuine issue of material facts by **facts** of which the court will take judicial notice; **and by evidentiary materials which the court is entitled to consider.** These include, in **conjunction** with the pleadings, affidavits, depositions, answers to interrogatories, admissions, oral testimony, and other miscellaneous types of evidence." (Emphasis added)

In this case there were no affidavits, no depositions, admissions, or oral testimony to support the motion for summary judgment. The motion was submitted on the pleadings only, that is, the petition of the plaintiffs and the answer of defendants—the latter containing denials of substantial factual averments necessary to the establishment of plaintiffs' claim for relief. We submit that under these circumstances there is nothing contained in Moore Sec. 56.15(3) or any other authority that we have been able to find which supports the conclusion reached by the Court below on the motion for summary judgment.

The only case cited in support of plaintiffs' motion for summary judgment at the time it was filed was *Gayle v. Browder, 352 U.S. 903*, affirming *142 F. Supp. 707* (M.D. Ala. 1956). The *Browder* case does not deal in the slightest with any motion for summary judgment and made no pretense whatsoever of dealing with the procedural point here involved. **After hearing witnesses and receiving other evidence,** the Court decided

on its merits that the ordinance in question was in violation of the Constitution and rendered judgment thereon.

No prior decisions of the Court of Appeals, Fifth Circuit, nor of any other Circuit were cited in support of the conclusion reached by the Court on the motion for summary judgment in the opinion below. The only authority cited to support its novel and far-reaching conclusion was the reference to Moore's Federal Practice, discussed above and shown to be inapposite to the decision rendered. For this reason, it is respectfully submitted that if this decision is permitted to stand it would have the effect of completely changing the procedural and pleading concepts embodied in the Federal Rules of Civil Procedure. Notice Pleading, as distinguished from fact pleading, will be rendered obsolete. Plaintiffs, ever hopeful of obtaining summary judgment in their favor, are in effect by the Court of Appeals urged to depart from the simple direct statement of the nature of their claim embodied in the rules and in the official forms annexed thereto, and to recite at great length all of their factual bases for their claim. Under these circumstances, if the defendant answers and does nothing more to **disprove** the plaintiff's allegations, the pleadings would be "ripe" for summary judgment in favor of the plaintiff; this cannot be the law.

Similarly, the decision below prompts a departure from the concept embodied in Rule 11, obviating the necessity or even desirability of verifying pleadings by affidavit, except in certain required circumstances, the attorney's certificate being deemed sufficient. We say this because the opinion below apparently construes plaintiff's complaint, supported only by an affidavit of one of the petitioners as being equivalent to the

establishment, for purposes of Rule 56, of all the factual averments contained therein, and places on the defendant answering such complaint the necessity of coming forward with similarly sworn pleadings, or presenting other contrary affidavits, on penalty of having summary judgment rendered against them. Nothing could be more foreign to the intent of the forms and method of pleading heretofore followed in Federal Procedure under the Rules.

Just who are these plaintiffs, and what are their rights to assert that they have been, are being, and will be deprived of their Constitutional rights by defendants? Their assertion that they use the public transportation system operated by defendant Baton Rouge Bus Company, Incorporated, in the City of Baton Rouge, has been denied. Plaintiffs' assertion that they have been compelled to occupy segregated sections in buses operated by defendant Baton Rouge Bus Company, Incorporated, has been denied. Plaintiffs' very interest and capacity in the principal question at issue is, therefore, denied in defendant's answer. **Are civil rights cases so completely different from any other cases in which a Constitutional issue is raised that the capacity of the plaintiff, his status as one entitled to complain, his interest in the subject matter, even though denied, is not a matter of fact to be established?** One who is not a property owner, or whose status as a property owner is in question, is not authorized to bring a property owner's suit to enjoin the collection of a tax. Is one who has not applied or whose status as an applicant for a job is in question able to bring into question alleged discrimination in hiring? Is one who is not a registered voter or whose status as a registered voter is denied or in question authorized to

obtain summary judgment in his favor as plaintiff in an election contest?

The plaintiffs' complaint and defendants' answer, in the form contemplated and in fact required by the Federal Rules of Civil Procedure, place at issue several crucial factual questions with regard to the right and the ability of these plaintiffs to assert a serious Constitutional issue, even should this Court choose, in its wisdom, to pass over defendants' denials that the actual practice in the handling and management of buses in the City of Baton Rouge results in an un-Constitutional segregation of the races.

It should also be noted that the prayer of plaintiffs' complaint and the injunctions sought and presumably granted by the District Court prohibit not only the enforcement of the City Ordinance in question, but "doing any other acts or taking any action" with regard to segregation in the operation of public transportation facilities. Here, again, practice and procedure and the factual situations which exist are called into question by plaintiffs' complaint and the denials in defendants' answer, and have been glossed over as a matter of law in the decision below.

It is therefore respectfully submitted that the mere fact that this case is one of those civil rights cases involving the alleged un-Constitutional segregation of the races is not sufficient authority for the Court of Appeals, Fifth Circuit, or any Court, to ignore the plain procedural requirements which must be met by one seeking motion for summary judgment. **Whether the same or a different result would be reached after establishment of facts by a trial, by affidavit, deposition, or other-**

wise is immaterial. It is submitted that in this case, for whatever the reason, the Federal practice and procedure of notice pleading, attorney's certificate on pleadings in lieu of verification by the parties, verification by **evidence** of the factual bases relied on in moving for summary judgment, are all ignored and are in effect repealed should the decision below be allowed to stand. We do not believe that any individual case or cause justifies this end. Procedure and practice cannot be made to depend on the **kind** of suit involved but must, of necessity, apply alike to all suits; otherwise there are no rules, no standard procedure, or recognized practices—these become merely forms to be followed as convenience dictates.

For these reasons, it is therefore submitted that every Judge and attorney in the land can only view with alarm the holding that (1) The filing of the complaint containing specific factual allegations verified by the affidavit by one of the petitioners, (2) the general denial of key allegations by defendants in answer, (3) renders the case "ripe for summary judgment" in favor of the plaintiff.

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

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CERTIFICATE

I certify that the within petition for writ of certiorari is presented in good faith and not for purpose of delay. I further certify that I have this day mailed a copy of this petition for writ of certiorari, postage prepaid, to A. P. Tureaud, attorney for respondents, 1821 Orleans Avenue, New Orleans, Louisiana.

Baton Rouge, Louisiana, September 10, 1962.

John V. Parker

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19120

JACK CHRISTIAN, ETC., ET AL.,

Appellants,

versus

THEODORE J. JEMISON, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 25, 1962)

Before RIVES, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The plaintiffs, Negroes living in Baton Rouge, Louisiana, brought this action on behalf of themselves and others similarly situated for an injunction against the enforcement of Section 118, Title 10, Chapter 2 of the Baton Rouge City Code of 1951. This ordinance requires local transportation companies to segregate the

seating of white and Negro passengers.[1] The district court granted summary judgment for the plaintiffs and the defendants, a group comprising various city officials, the Baton Rouge Bus Company, Incorporated and certain of its officers, brought this appeal. We affirm.

The central issue in this case is cut and dried. The Supreme Court has settled beyond question that no State may require racial segregation of interstate transportation

[1] Section 118 provides as follows:

"Section 118. Seating of Passengers.

(1) Separation of Races in Buses: Every transportation company, lessee, manager, receiver or owner thereof, operating passenger buses in the City of Baton Rouge as a carrier of passengers for hire, shall require that all white passengers boarding their buses for transportation shall take seats from the forward or front end of the bus and that all Negro passengers boarding their buses for transportation shall take seats from the back or rear end of the bus.

(2) Reservation of Seats: No white passenger shall occupy the long rear seat of the bus, which shall be reserved for the sole and exclusive use of negro passengers. No negro passenger shall occupy the two front seats facing the aisle of the bus, but such seats shall be reserved for the sole and exclusive use of white passengers.

(3) No passengers of different races shall occupy the same seat.

(4) When there may be or become vacant and available for occupancy any seat in the rear of a seat occupied by a Negro passenger or passengers, such negro passenger or passengers shall, when requested by the operator of the bus, remove to such rear seat; and, likewise, when there may be or become vacant and available for occupancy any seat in front of any seat occupied by a white passenger or passengers, such white passenger or passengers shall, when requested by the operator of the bus, remove to such front seat.

(5) Authority of Bus Operator: The operator on all passenger buses in the City of Baton Rouge shall have authority to refuse any passenger further occupancy or use of any bus in the City of Baton Rouge unless such passenger shall comply with the provisions of this ordinance.

(6) Chartered and Special Buses: The provisions of this ordinance shall not apply to any chartered bus or special bus run strictly designated for the exclusive use of members of any race, but in such cases, such bus or buses shall be plainly marked 'Charter' or 'Special.'

(7) Penalties: Any person, firm, corporation or association of persons or a member thereof convicted of violating any provisions of this ordinance shall be fined not less than ten dollars ($10.00) nor more than one hundred dollars ($100.00), or imprisonment for not less than ten (10) days, nor more than sixty (60) days, or both, at the discretion of the Court for each offense:

(8) This ordinance, being an emergency ordinance, shall be effective upon adoption."

facilities. *Morgan v. Virginia*, 328 U. S. 373; *Gayle v. Browder*, 352 U. S. 903; *Boynton v. Virginia*, 364 U. S. 454." *Bailey v. Patterson*, 1962, U. S. . The Supreme Court has also decided that since the unconstitutionality of such segregation laws is clear, a single-judge district court may enjoin their enforcement:

> "The question is no longer open; it is foreclosed as a litigable issue. Section 2281 [of Title 28, U.S.C.A.] does not require a three-judge district court when the claim is that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent. Ex parte Poresky, 290 U. S. 30; Bell v. Waterfront Comm'n, 279 F. 2d 853, 857-858. We hold that three judges are similarly not required when, as here, prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." Bailey v. Patterson, *supra*; Turner v. City of Memphis, 1962, U. S.

The defendants raise several collateral objections in an effort to avoid the injunction against enforcement of the unconstitutional ordinance. The principle of these is their contention that this suit is barred by res judicata. Section 118 was adopted by the City of Baton Rouge in June 1953. Shortly afterwards, certain Negroes living in the city, including the Reverend Theodore L. Jemison and one other plaintiff in the instant suit, sued in a Louisiana state court to enjoin the enforcement of the ordinance. They alleged that the ordinance was unconstitutional and also invalid for other reasons. The state court did not reach the merits of the constitutional issue, however, since it found that the constitutional objection had not been properly pleaded. It stated: "In the matters of this kind mere generalities and

conclusions do not suffice. The pleader is required to set forth just what part of the constitution is violated and in what respect the violation exists. The constitutional attack therefore must be held to have failed." The court found no merit in the other objections and denied relief January 20, 1954. No appeal was taken from that judgment.

The defendants' res judicata argument might be attacked on several bases.[2] But the reason that demonstrates its inapplicability most clearly to us is the momentous change that has occurred in the field of constitutional law since the adjudication of the first suit. The Supreme Court has many times declared "the general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." *State Farm Mutual Auto Ins. Co. v. Duel*, 1945, 324 U. S. 154, 162, 65 S. Ct. 573, 89 L. Ed. 812; *Blair v. Commissioner*, 1937, 300 U. S. 5, 57 S. Ct. 330, 81 L. Ed. 465; *Commissioner v. Sunnen*, 1948, 333 U. S. 591, 68 S. Ct. 715, 92 L. Ed. 898. The earlier judgment asserted here was issued before the sands ran out on the "separate but equal" doctrine. Three months after the judgment in the state court, the Supreme Court announced its historic decision in *Brown v. Board of Education*, 1954, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 overturning the "separate but equal" doctrine that had dominated the constitutional law pertinent to racial equality since the landmark case of *Plessy v. Ferguson*, 1896, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256. It was the Brown precedent that led to the decisions, previously cited, in which segregation of local transportation facilities has been

[2] The plaintiffs also contend that res judicata is inapplicable since this suit does not involve the same plaintiffs or the same defendants and since the prior suit did not reach the merits of the constitutional question.

declared unconstitutional. In other related areas the law has been similarly transformed. If ever there was "an intervening decision or change in the law creating an altered situation," this is it! The wisdom of the rule which exempts such cases from the doctrine of res judicata is clearly revealed in this instance. It would be a senseless absurdity to sanction in Baton Rouge segregated seating under a law patently unconstitutional while everywhere else in the country segregated seating is prohibited. The Constitution is not geared to patchwork geography. It tolerates no independent enclaves.

The appellants claim also that summary judgment was improper since there were factual issues in dispute on which the district court should have received evidence. In their appellate brief, the defendants question whether the plaintiffs are Negro citizens of Baton Rouge who use the public transportation system, whether the Baton Rouge Bus Company operates its buses on a segregated system, and whether the plaintiffs have been compelled to occupy segregated sections of the buses. The plaintiffs' complaint specifically averred each of these facts. The defendants responded with a general denial. At no time *prior to judgment* did they attempt to show that these allegations by the plaintiff were in dispute; a general denial is insufficient for this purpose. 6 Moore's Federal Practice §56.15(3), (2nd Ed., 1953). On this basis the case was ripe for summary judgment.

We have examined all of the defendants' other objections. They have no merit.

The judgment is

AFFIRMED.